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Supreme Court of the United States

OCTOBER TERM, 1952

No. 295

ARNETT M. HOWARD, KENNETH M. JOHNSON, EDWARD W. MICHEY, ET AL., APPELLANTS,

vs.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

FILED AUGUST 27, 1952

Probable Jurisdiction Noted October 27, 1952

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE COURT OF APPEALS OF KENTUCKY

ARNETT M. HOWARD, et al., Appellants

vs.

COMMISSIONERS OF THE SINKING FUND, et al., Appellees

STATEMENT ON APPEAL

(1) The names of the parties to this appeal are as stated in the above caption.

(2) The judgment appealed from was rendered by the Jefferson Circuit Court, Chancery Branch, First Division, on June 4th, 1952, and may be found on Page 30 of the Transcript of the record herein.

(3) The appeal was granted by the Court below and no summons are desired.

(4) The names and addresses of Counsel for the Appellees are as follows:

Hon. Gilbert Burnett, City Attorney, City Hall, Louisville.

Mr. Alex Humprey, Asst. City Attorney, City Hall, Louisville.

(S.) William A. Armstrong, D. E. Armstrong.

[fol. 2] [Caption omitted]

[fol. 3] JEFFERSON CIRCUIT COURT CHANCERY BRANCH
FIRST DIVISION COMMONWEALTH OF KENTUCKY

ARNETT M. HOWARD, KENNETH N. JOHNSON, EDWARD W. MICHEY and WILLIAM H. WINES, for and on behalf of themselves and all other employees of the United States Naval Ordnance Plant, Plaintiffs,

vs.

COMMISSIONERS OF THE SINKING FUND of the City of Louisville; CHARLES FARNSLEY, Mayor and member; DANN C. BYCK, member; THOMAS GRAHAM, President; MERLE E. ROBERTSON, Vice President; LEE P. MILLER, member. All of whom comprise the Commissioners of the Sinking Fund of the City of Louisville, Kentucky; BEN J. BRUMLEVE, Secretary-Treasurer of the Sinking Fund of the City of Louisville, Defendants

PETITION IN EQUITY—Filed May 23, 1951

Plaintiffs, Arnett M. Howard, Kenneth N. Johnson, Edward W. Mickey, and William H. Wines, state that they are resident of Jefferson County, Kentucky, and that the defendants, Commissioners of the Sinking Fund of the City of Louisville, Kentucky, is a Commission duly created and established by virtue of K.R.S. 91.130; that each of the individual defendants are members and officers of said Commission; Charles Farnsley and Dann C. Byck by virtue of their offices as Mayor and President of the Board of Aldermen respectively; Merle E. Robertson as Vice-President, Lee P. Miller as a member, and Thomas Graham as President of said Commission, duly elected by the Board of Aldermen, and Ben J. Brumleve as the duly elected Secre- [fol. 4] tary-Treasurer of the said Commission. Plaintiffs further state that the Commissioners of the Sinking Fund is the administrative body charged with the administration of the Sinking Fund, and Ben J. Brumleve, Secretary-Treasurer, is charged with the enforcement of the ordinances requiring payments to be made into said Sinking Fund. The defendant, City of Louisville, is a municipal corporation created under and by authority of law.

That the Board of Aldermen of the City of Louisville, on May 25th, 1948, enacted an ordinance, same being Ordi-

nance 112, Series 1948, which has been amended from time to time, and now appearing as Ordinance 83, Series 1950, which ordinance imposes an annual license fee for the privilege of engaging in any gainful occupation within the City of Louisville, and known as the occupational tax ordinance.

That the Board of Aldermen of the City of Louisville, on April 1st, 1947, enacted an ordinance, same being Ordinance 66, Series 1947, by which it was proposed to annex to the City of Louisville certain territories lying and being East and South of the then existing corporate limits of the City of Louisville, which ordinance was signed by the Mayor on April 1, 1947; and that on June 27, 1950 an ordinance was enacted, same being Ordinance 179, Series 1950, by which the proposed territory was annexed to the City of Louisville, which ordinance was signed by the Mayor on June 30, 1950. That included within the territory embraced in the annexation ordinance aforesaid is the land consisting of more than 135 acres on which is located the United States Naval Ordnance Plant, an instrumentality of the United States, which land was acquired by the United States by condemnation proceedings filed in the United States District Court for the Western District of Kentucky [fol. 5] in December, 1940, being Action No. 244, deed to land is recorded in Deed Book 1797, Page 337, in the office of the County Court Clerk of Jefferson County, Kentucky; that said land was acquired by the United States by and with the consent of the State of Kentucky under authority of K.R.S. 3/010, which reads as follows:

> "The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this state heretofore legally acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of post offices, custom houses, courthouses, and other needful buildings, and for locks, dams and canals in improving the navigation of the rivers and water within and on the borders of Kentucky."

That by K. R. S. 3.020 it is provided:

"Kentucky retains jurisdiction for the execution of process, issued under its authority, over all lands in Kentucky heretofore or hereafter ceded to or acquired by the United States for the erection or establishment of post offices, custom houses, courthouses, locks, dams, canals, parks, cereteries or forest reserves."

That the United States, by and through the Secretary of the Navy accepted exclusive jurisdiction over the said land on May 23, 1941, which acceptance of exclusive jurisdiction was acknowledged by the Governor of Kentucky on May 26, 1941, and became effective on May 28th, 1941 at 12 o'clock noon.

That by reason of the acquisition of said land by the United States and the acceptance of exclusive jurisdiction by the United States, and the act of the Governor ceding the State of Kentucky's jurisdiction to the United States, [fol. 6] the lands comprising the United States Naval Ordnance Plant, to all intents and purposes, ceased to be a part of the state of Kentucky within whose bordeus it lies; and that consequently the State of Kentucky and or the City of Louisville have no legislative jurisdiction of any kind over the territory embraced within the boundaries of the lands so acquired by the United States, or any activities carried on thereon; and that the land, not being a part of the State of Kentucky could not and cannot lawfully be annexed so as to become a part of the City of Louisville, and that Ordinance 179, Series 1950, by which the City of Louisville attempted to annex such territory to the City is void in respect to the land owned by the United States and over which exclusive jurisdiction has been ceded to the United States by the State of Kentucky and said exclusive jurisdiction accepted by the United States; and that the lands on which is located the United States Naval Ordnance Plant is not a part of the said City of Louisville.

The plaintiffs, all of whom are employed by the United States Naval Ordnance Plant, suing in their own behalf and in behalf of all other employees of the United States

Naval Ordnance Plant, state that the question involved in this action is one of common and general interest to all employees who receive their income from work done and performed within the territory of the United States Naval Ordnance Plant over which the United States has exclusive jurisdiction; that the land on which the said United States Naval Ordnance Plant is located is not, under the law, a part of the City of Louisville; that it is impracticable to bring this group of employees, numbering several hundred persons, before the Court within a reasonable time, and plaintiffs seek to prosecute this action as a representative action for the benefit of all persons employed on the lands on which the United States Naval Ordnance Plant is located.

[fol. 7] That a question has arisen and there is a dispute and controversy as to whether plaintiffs and all other employees of the United States Naval Ordnance Plant, by reason of the attempted annexation of the said land, should pay the occupational tax or license fee under Ordinance 83, Series 1950, above referred to, the defendant, Ben J. Brumleve, as Secretary-Treasurer of the Commissioners of the Sinking Fund insisting that plaintiffs and all other employees of the United States Naval Ordinance Plant are subject to the tax or license fee, and must pay the same, and the plaintiffs and all other employees insisting that in as much as the land on which the United States Naval Ordnance Plant is located is not and cannot be a part of the City of Louisville they are not subject to the occupational tax or license fee.

That the defendant, Ben J. Brumleve, Secretary-Treasurer of the said Commissioners of the Sinking Fund, has and is calling on McF. W. Wood, Captain U. S. Navy and head of the United States Naval Ordnance Plant, to furnish to him and to the Commission Forms W-2 showing the earnings of each employee of the said United States Naval Ordnance Plant from July, 1950 to the end of 1950 and subsequent periods of time, and is attempting to coerce payment of said occupational tax or license fee from said employees of the United States Naval Ordnance Plant.

Plaintiffs state that their rights are affected, and that an actual controversy exists with respect to their rights and obligations under the law of the United States and the

occupational tax or license fee ordinance aforesaid, and they contend:

(1) That in as much as the United States purchased the land upon which the United States Naval Ordnance Plant is located by and with the consent of the State of Kentucky, and further, in view of the fact that the United States, by and through its Secretary of the Navy accepted exclusive jurisdiction over the said lands, which acceptance of exclusive jurisdiction was acknowledged and ceded by the [fol. 8] Governor of the State of Kentucky, that consequently the land over which the United States has exclusive jurisdiction is not in reality a part of the City of Louisville,

(2) That the City of Louisville cannot legislate on any question which affects the said land on which the United States Naval Ordnance Plant is located, and consequently these plaintiffs and all other employees of the United States Naval Ordnance Plant are not subject to the occupational tax or license fee;

(3) That their employment and earnings, being done and received for work performed on lands which is not a part of the City of Louisville and over which the United States has exclusive jurisdiction, is the same as if they were being employed and received their salaries outside the City and State;

(4) That the assessment and attempt to collect the occupational tax or license fee is in violation of their constitutional rights in that it will deprive them of their property without due process of law under the 5th and 14th Amendment to the Constitution of the United States; and

(5) That as a result of the above these plaintiffs and all other employees of the United States Naval Ordnance Plant are exempt from the provisions of Ordinance 83, Series 1950 and the regulations thereon.

Plaintiffs state that the defendant, Ben J. Brumleve, Secretary Treasurer of the Commissioners of the Sinking Fund, is construing the said Ordinance 179, Series 1950, by which the City of Louisville attempted to annex the land on which the United States Naval Ordnance Plant is located, as placing the said land within the corporate limits and a component part of the City of Louisville, and consequently construing Ordinance 83, Series 1950, which is the

occupational tax or license fee ordinance, as applying to [fol. 9] these plaintiffs and all other employees of the United States Naval Ordnance Plant, in a manner violative of the law, and that unless the defendants are enjoined from so doing, irreparable injury will result to these plaintiffs and all other employees of the United States Naval Ordnance Plant. Plaintiffs state that no injunction has been heretofore applied for, granted or refused by the Court or any circuit judge.

Plaintiffs state that they bring this action under Chapter 83 of the Act of the General Assembly of Kentucky at the session held in 1922, same now being Section 639a-1 et seq. Civil Code of Practice, and ask for a declaration of their rights.

Wherefore, plaintiffs pray;

(1) That the matters in controversy in this action involve a common or general interest to plaintiffs and all other employees of the United States Naval Ordnance Plant and the defendants;

(2) That plaintiffs be permitted to prosecute this action for and on behalf of themselves and all other employees of the United States Naval Ordnance Plant;

(3) That it be adjudged that an actual controversy has arisen and exists between these plaintiffs and all other employees of the United States Naval Ordnance Plant and the defendants; that the rights and obligations of all parties are affected by statute and the ordinance in question, and that a declaration of rights of the parties and construction of the statutes and ordinances involved is necessary and proper under the circumstances alleged and that the reasons exist for an immediate hearing and determination of the case.

(4) That the Court determine and declare:

(a) That the land upon which is located the United States Naval Ordnance Plant, after its purchase by the United States, by and with the consent of the State of Ken- [fol. 10] tucky; the acceptance of exclusive jurisdiction by the United States and the acknowledgment and ceding of the exclusive jurisdiction thereof by the Governor on May 26, 1941 to all intents and purposes ceased to be a part of

the State of Kentucky and therefore could not be subject to annexation by the City of Louisville;

(b) That the plaintiffs and all other employees of the United States Naval Ordnance Plant who receive their income from work done and performed within the territory of the United States Naval Ordnance Plant over which the United States has exclusive jurisdiction, do not perform work within the boundaries of the City of Louisville;

(c) That plaintiffs and all other employees of the United States Naval Ordnance Plant are not, as a consequence, subject to the payment of the occupational tax or license fee imposed by Ordinance 83, Series 1950;

(d) That plaintiffs' employment and the employment of all other employees of the United States Naval Ordnance Plant, being on land which is not a part of the City of Louisville or the State of Kentucky, and over which the United States has exclusive jurisdiction, is the same as if they were being employed and were receiving salaries outside the City of Louisville;

(5) That a temporary injunction be granted against the defendants and each of them, enjoining them from enforcing or attempting to enforce the provisions of Ordinance 83, Series 1950 and the regulations thereof against these plaintiffs and all other employees of the United States Naval Ordnance Plant, or from demanding the delivery of Forms W-2 from the said United States Naval Ordnance Plant or from assessing and collecting or attempting to collect the occupational tax or license fee from these plaintiffs and all other employees of the said United States Naval [fol. 11] Ordnance Plant; and that said injunction be made permanent on the final determination of this action;

(6) Plaintiffs further pray for their costs herein expended and for all proper, general or equitable relief to which they are entitled.

(S.) Armstrong & Armstrong, (S.) W. A. Armstrong, (S.) Donald E. Armstrong, Attorneys for Plaintiffs.

Duly sworn to by Arnett R. Howard and Kenneth M. Johnson. Jurat omitted in printing.

[fol. 12] In Circuit Court of Jefferson County

Summons and Returns

To the Sheriff of Jefferson County, Greeting:

We command you to summon ——— Commissioners of the Sinking Fund of the City of Louisville,

Charles Parnsley, Mayor, City Hall.

Dann C. Byck, Member, c/o Byck Bros., 532 S. 4th.

Thomas Graham, President, c/o Bankers Bond, Ky. Home Life Bldg., 237 S. 5th Street.

Merle E. Robertson, Vice President, c/o Liberty Nat'l Bank, 2nd & Market Sts.

Lee P. Miller, Member, c/o Citizens' Fidelity, 5th & Jefferson.

Ben J. Brumleve, Sinking Fund, City Hall.

City of Louisville, Serve Mayor, City Hall.

#327-997

to answer an Equity petition filed against the above named in our Jefferson Circuit Court, by Arnett M. Howard, Kenneth N. Johnson, Edward W. Michey, and William H. Wines, for and on behalf of themselves and all other employees of the United States Naval Ordnance Plant and warn the above named that upon failure to answer within twenty days after service hereof, if in Jefferson County, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option, and make due return of this summons within sixty days from the date hereof.

Witness, Karl E Rothrock, Clerk of said Court, this 23rd day of May 1951.

Karl E. Rothrock, Clerk; By (S.) L. H. Gross, D. C.

[fol. 13] Sheriff's returns on the foregoing summons are as follows, to-wit:

Executed 5-25, 1951 on Commissioner of the Sinking Fund of the City of Louisville by delivering to Ben J. Brumleve, Commissioner, a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25, 1951 on Ben J. Brumleve by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25-1951 on Dann C. Byck by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25, 1951 on Thomas Graham by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25-1951 on Merle E. Robertson by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25, 1951 on Lee P. Miller by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed on the defendant, Charles P. Farnsley, this the 5th day of June, 1951, by delivering a ~~true~~ copy of the within summons to Charles P. Farnsley, Mayor of the City of Louisville, through Mary Lou Hubbard, his secretary, the said Charles P. Farnsley, Mayor having filed a duly executed writing with me authorizing process to be served on the Mayor of the City of Louisville to be executed on him by serving either Mary Lou Hubbard, his secretary, or George A. Hendon, Jr., his executive assistant.

Bernard J. Bax, Sheriff Jefferson Co., Ky. By (S.) Harry Riehl, D. S.

Executed on the defendant, the City of Louisville on this the 5th day of June, 1951, by delivering a true copy of the within summons to Charles P. Farnsley, Mayor of the City of Louisville, through Mary Lou Hubbard, his secretary, the said Charles P. Farnsley Mayor, having filed a duly

executed writing with me authorizing process to be served on the Mayor of the City of Louisville to be executed on him by serving either Mary Lou Hubbard, Secretary, or George A. Hendon, Jr., executive assistant.

Bernard J. Bax, Sheriff, Jefferson Co., Ky. By (S.) Harry Riehl, D. S.

[fol. 15] In Circuit Court of Jefferson County

[Title omitted]

Special Demurrer—Filed June 29, 1951

Come the defendants herein, by counsel, and demur specially to the petition heretofore filed herein on the ground that the Court has no jurisdiction of the subject of the action.

(S.) Gilbert Burnett, City Attorney, Robert W. Meagher, Assistant City Attorney, Attorneys for Defendants.

[fol. 16] In Circuit Court of Jefferson County

[Title omitted]

General Demurrer—Filed June 29, 1951

Come the defendants herein, by counsel, and without waiving their special demurrer heretofore filed herein, demur generally to the petition on the ground that it does not state a cause of action against them or any of them and that it does not state facts sufficient to support a cause of action against them.

(S.) Gilbert Burnett, City Attorney, Robert W. Meagher, Asst. City Attorney, Attorneys for defendants.

IN CIRCUIT COURT OF JEFFERSON COUNTY

ORDER AUTHORIZING PROSECUTION OF CASE NS.. v. CLASS ACTION AND INJUNCTION —July 11, 1951

This action coming before the Court on special demurrer and general demurrer filed herein by the defendants, to the petition of the plaintiffs.

Now come the plaintiffs, by counsel, and in writing filed, move the Court to enter an order authorizing plaintiffs to prosecute this action for and on behalf of themselves and all other employees of the United States Naval Ordnance Plant as a class action.

The Court being advised, it is ordered by the Court that said motion be and same is hereby sustained.

[fol. 17] On motion of the plaintiffs, and the Court being sufficiently advised, it is ordered, and adjudged as follows:

Because the question in this action is one of common and general interest to all employees of the United States Naval Ordnance Plant, who receive their income from work done or services performed within the limits of the area on which is located the United States Naval Ordnance Plant, and it is impracticable to bring this group composed of more than four hundred persons, before the Court within a reasonable time, the plaintiffs are hereby authorized and directed to prosecute this action for and on behalf of themselves and all other employees of the said United States Naval Ordnance Plant.

The Court having heard arguments of counsel on the special demurrer filed herein by the defendants to the plaintiffs' petition, and the Court being advised, it is ordered by the Court that this action be and same is hereby submitted on both the special and general demurrers filed herein. Counsel to file briefs.

This action coming on to be heard, and the Court being sufficiently advised, it is now considered, ordered and adjudged that the defendants be and they are hereby enjoined from enforcing or attempting to enforce the provisions of Ordinance 83, Series 1950 and the regulations thereof against the plaintiffs and all other employees of the United States Naval Ordnance Plant, or from collecting or attempting to collect the occupational tax or license from

these plaintiffs and all other employees of the United States Naval Ordnance Plant until the final determination of this action.

Temporary Injunction and 8 copies issued.

[fol. 18] IN CIRCUIT COURT OF JEFFERSON COUNTY

ARNETT M. HOWARD, et al., Plaintiffs

v.

COMMISSIONERS OF THE SINKING FUND, et al., Defendants

OPINION—October 25, 1951

Plaintiffs are employees of the Naval Ordnance Plant operated by the Federal Government, which is located in territory formerly south of the City of Louisville but in 1947 attempted to be annexed to the City of Louisville by annexation ordinance adopted on June 30, 1950, which included the Naval Ordnance Plant; and the defendant, the City of Louisville, is attempting to impose an occupational tax on the employees who are admittedly employed and performing their services within the boundaries of the Naval Ordnance Plant.

The Plant, consisting of 135 acres, was acquired by the United States Government by condemnation proceedings in December, 1940, and was also acquired with the consent of the State of Kentucky under authority of K.R.S. 3.010, which reads as follows:

[fol. 19] "The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this state heretofore legally acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of post offices, custom houses, courthouses, and other needful buildings, and for locks, dams and canals in improving the nagivation of the rivers and waters within and on the borders of Kentucky."

The Commonwealth of Kentucky retained only the jurisdiction of the said lands for the purpose of execution and

process issued under its authority in that the United States Government by and through the Secretary of the Navy acquired exclusive jurisdiction over the said land on May 13, 1941, which acceptance was acknowledged by the Governor of Kentucky on May 26, 1941, and became effective on May 28, 1941, at 12:00 noon.

Attack is made upon the ordinance of the City seeking to annex the territory acquired by the United States on the grounds:

(1) That inasmuch as the United States purchased the land upon which the United States Naval Ordnance Plant is located by and with the consent of the State of Kentucky, and further, in view of the fact that the United States, by and through its Secretary of the Navy accepted exclusive jurisdiction over the said lands, which acceptance of exclusive jurisdiction was acknowledged and ceded by the Governor of the State of Kentucky, that consequently the land over [fol. 20] which the United States has exclusive jurisdiction is not in reality a part of the City of Louisville;

(2) That the City of Louisville cannot legislate on any question which affects the said land on which the United States Naval Ordnance Plant is located, and consequently these plaintiffs and all other employees of the United States Naval Ordnance Plant are not subject to the Occupational tax or license fee;

(3) That their employment and earnings, being done and received for work performed on lands, which is not a part of the City of Louisville and over which the United States has exclusive jurisdiction, is the same as if they were being employed and received their salaries outside the City and State;

(4) That the assessment and attempt to collect the occupational tax or license fee is in violation of their constitutional rights in that it will deprive them of their property without due process of law under the 5th and 14th Amendment to the Constitution of the United States; and

(5) That as a result of the above these plaintiffs and all other employees of the United States Naval Ordnance Plant are exempt from the provisions of

Ordinance 83, Series 1950, and the regulations thereon. The Court is called upon in this action under the Declaratory Judgment Act to determine and declare:

(a) That the land upon which is located the United States Naval Ordnance Plant, after its purchase by the [fol. 21] United States, by and with the consent of the State of Kentucky; the acceptance of exclusive jurisdiction by the United States and the acknowledgement and ceding of the exclusive jurisdiction thereof by the Governor on May 26, 1941, to all intents and purposes ceased to be a part of the State of Kentucky and therefore could not be subject to annexation by the City of Louisville;

(b) That the plaintiffs and all other employees of the United States Naval Ordnance Plant who receive their income from work done and performed within the territory of the United States has exclusive jurisdiction, do not perform work within the boundaries of the City of Louisville;

(c) That plaintiffs and all other employees of the United States Naval Ordnance Plant are not, as a consequence, subject to the payment of the occupational tax or license fee imposed by Ordinance 83, Series 1950;

(d) That plaintiff's employment and the employment of all other employees of the United States Naval Ordnance Plant, being on land which is not a part of the City of Louisville or the State of Kentucky, and over which the United States has had exclusive jurisdiction, is the same as if they were being employed and were receiving salaries outside the City of Louisville.

Defendants have filed a special and general demurrer and it is argued by the defendants:

[fol. 22] (1) That the Naval Ordnance Plant heretofore referred to as a plant was properly included within the geographical boundaries of the City;

(2) This action is a collateral attack upon the valid annexation of which this court lacks jurisdiction, and

(3) Assuming that allegations of the petition are true, it does not state a cause of action and is therefore demurrable generally.

It is contended by the defendants that the pivotal question in this case seems to be whether the City of Louisville had jurisdiction to annex the plant along with the rest of the territory embraced in the ordinance of June, 1950, and that proper answer to this question can only be obtained by construing Article I, Section 8, Clause 17 of the Federal Constitution, which reads as follows:

> "To exercise exclusive legislation in all cases whatsoever over such district not exceeding 10 miles square as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for erection of forts, magazines, arsenals, dock yards, and other needful buildings."

There is no question but that the state and its political subdivision, the City of Louisville, is bound by the legislative act in which it consented to the acquisition of the [fol. 23] United States Government of the plant and retained jurisdiction only for the execution of process and therefore no act of the City of Louisville which attempted to exercise jurisdiction over the plant can be upheld. The claim of the plaintiffs of the acquisition of the land by the United States pursuant to Clause 17 aforementioned and the consent of the Commonwealth of Kentucky would create a separate and geographical province must be sustained.

Defendants in their brief admit that the Language used in the line of Supreme Court cases ending with Standard Oil Co. v. California (1934) 291 U.S. 245, 78 L. Ed. 775, and others would seem to support the argument of plaintiffs herein to the effect that such Federal areas are separate provinces or countries, but they argued more recent Supreme Court cases indicate a trend away from a separate province or country. They cite in support of their view cases of James v. Drave Construction Co. (1937) 302

U.S. 134, 82 L. Ed. 155, and James Stewart Co. v. Sadrakula (1940) 309 U.S. 94, 84 L. Ed. 596, Jewell v. Cleveland Wrecking Co. (1940) 111 Fed. (2d) 305. An examination of those cases shows that they are mostly labor cases. The Dravo case was the enforcement of a gross receipts tax. The question was (1) whether the state had territorial jurisdiction to impose the tax, and (2) whether the tax was invalid as laying a burden on the operations of the federal government. The contractor was engaged in buildings locks and dams in the Kanawha River and the court found that a large part of the contractor's work was performed at his plant in Pittsburgh, Pennsylvania, and the [fol. 24] materials and equipment were fabricated at Pittsburgh and delivered to West Virginia where they were installed. The court said:

> "As to work done within the exterior limits of West Virginia the question is whether the United States has acquired exclusive jurisdiction over the respective sites. Wherever the United States has such jurisdiction the State would have no authority to lay the tax." Citing Surplus Trading Co. v. Cook, 281 U.S. 647, 74 L. ed. 1091.

It further said:

> "As to the beds of the Kanawha and Ohio Rivers. The present question is not one of paramount authority of the federal government to have the work performed for purposes within the federal province * * * or whether the tax lays a burden upon governmental operations; it is simply one of territorial jurisdiction."

It further held:

> "There does not appear to have been any acquisition by the United States to title to those lands, unless, as respondent urges, the occupation of the beds for the purpose of the improvements constituted an acquisition of title. * * * No transfer of title appears. The Solicitor General conceded in his argument at bar that the State of West Virginia retained its ter- [fol. 25] ritorial jurisdiction over the river beds and we are of the opinion that this is the correct view."

In the case at bar it is admitted that the Commonwealth of Kentucky did not retain any territorial jurisdiction over the plant except for the purpose of process and the defendant, as a political subdivision of the commonwealth, can claim no greater right than the Commonwealth of Kentucky, The opinion in the Dravo case cited supra further states:

> "Clause 17, (referring to Clause 17 of Section 8 of Article I) governs those cases where the United States acquires lands with the consent of the legislature of the state for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the state to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the Federal jurisdiction." Citing cases.

It is noted that in the cession by the State of Virginia of the lands that concurring jurisdiction was retained over any land so acquired by the United States. Such is not contained in the Act of the Commonwealth of Kentucky which is involved in this case. They retained jurisdiction only for the service of process. All other jurisdiction was granted exclusively to the United States. The [fol. 26] court further said in the Dravo case:

> "It is not questioned that the State may refuse jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders, * * * In that event as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses."

The Court also held that the tax was valid on the ground that it did not lay a direct burden upon the Federal Govern-

ment, that it was not laid upon the Government, its property or officers, or upon an instrumentality of the Government. The respondent, Dravo Construction Company, was independent contractor. The tax was not laid upon the Government.

Being convinced that the defendant, City of Louisville, has no power to legislate over the territory embraced in the plant because of the exclusive jurisdiction, without res- [fol. 27] ervations, granted to the United States in the Act aforesaid, it is not necessary to discuss in this opinion the power of the City to levy tax upon the employees of the plant. The special demurrer must therefore be overruled.

None of the cases cited by the defendant show a trend away from the view taken by the Supreme Court in the earlier cases which created a separate province or country doctrine. The case at bar is a typical case which calls for the application of the separate province or country doctrine and which throws a shield over the whole plant area in this case which neither the City nor the State or any of its political subdivisions may penetrate. The general demurrer, as well as the special demurrer, must therefore be overruled for the reasons herein stated.

(S.) Lawrence F. Speckman, Judge.

October 25, 1951

[fol. 28] In Circuit Court of Jefferson County

[Title omitted]

Arnett M. Howard, et al., Plaintiffs,

vs.

Commissioners of the Sinking Fund, et al., Defendants

Judgment—November 13, 1951

This matter coming on to be heard on the defendants' special and general demurrers to the plaintiffs' petition, and the Court being sufficiently advised, it is now Considered, Ordered and Adjudged that the defendants' special and general demurrers to the petition be and the same are hereby overruled, and the defendants declining

to plead further, it is hereby ordered and adjudged that the rights of the parties be, and they are hereby declared to be as follows:

1. That an actual controversy has arisen and exists between the plaintiffs and the defendants.

2. That the matters in controversy in this action involve a common or general interest to plaintiffs and all other employees of the United States Naval Ordnance Plant who received their pay for work done or services performed within the limits of the area on which is located the United States Naval Ordnance Plant, and the defendants.

3. That the area comprising the United States Naval Ordnance Plant, having been acquired by condemnation by the United States by and with the consent of the legis- [fol. 29] lature of the State of Kentucky, and over which area the United States had, on May 23, 1941, accepted exclusive jurisdiction under Title 40, Section 255, U.S.C.A., which acceptance of exclusive jurisdiction was acknowledged by the Governor of Kentucky on May 26, 1941, thereafter, to all intents and purposes ceased to be a part of the State of Kentucky, and therefore could not be subject to annexation by the City of Louisville.

4. That the plaintiffs and all other employees of the United States Naval Ordnance Plant who receive wages from work done and performed within the area on which the United States Naval Ordnance Plant is located, and over which the United States holds title and has exclusive jurisdiction, do not perform work within the boundaries of the City of Louisville.

5. That plaintiffs' employment and the employment of all other employees of the United States Naval Ordnance Plant, being in an area which is not a part of the State of Kentucky or the City of Louisville, and to which the United States holds title and has exclusive jurisdiction, is the same as though said employees were working and receiving wages outside the City of Louisville, in a foreign jurisdiction.

6. That plaintiffs and all other employees of the United States Naval Ordnance Plant are not, as a consequence subject to the payment of the occupational tax or license fee imposed by Ordinance 83, Series 1950 of the defendant City, and are exempt therefrom.

7. That the assessment and attempt to collect the occupational tax or license fee from these plaintiffs and all other employees of the United States Naval Ordnance [fol. 30] Plant is in violation of their constitutional rights in that it will deprive them of their property without due process of law under the 14th Amendment to the Constitution of the United States.

8. It is further ordered and adjudged that the defendants and each of them be and they are hereby permanently enjoined from enforcing or attempting to enforce the provisions of Ordinance 83, Series 1950 and the regulations thereof against the plaintiffs and all other employees of the United States Naval Ordnance Plant, or from collecting or attempting to collect the occupational tax or license fee from the plaintiffs and all other employees of the United States Naval Ordnance Plant.

9. It is further ordered and adjudged that the plaintiffs recover their costs in this action.

To all of which the defendants object and except, and pray an appeal to the Court of Appeals of Kentucky, which is hereby granted.

(S.) Lawrence F. Speckman, Judge.

(S.) W. A. Armstrong, D. E. Armstrong, Attorneys for Plaintiffs. Gilbert Burnett, City Attorney; Alex P. Humphrey, Asst. City Attorney; Robert W. Meagher, Asst. City Attorney, Attorneys for Defendants.

[fol. 31] In Circuit Court of Jefferson County

Arnett M. Howard, et al., Plaintiffs

vs.

Commissioners of the Sinking Fund of the City of Louisville, et al., Defendants

Order and Judgment on Mandate from Court of Appeals —June 4, 1952

Come the defendants, Commissioners of the Sinking Fund, et al., by counsel, and tender the mandate of the Court of Appeals which mandate reads in part:

> "The Court being sufficiently advised, it seems to them the judgment herein is erroneous.
>
> It is therefore considered that said judgment be reversed and cause remanded with directions to enter a judgment sustaining the general demurrer of the defendants and upholding the right of the City to collect the occupational license tax from persons employed at the Naval Ordnance Plant."

It is hereby ordered that said mandate be made a part of this record and filed herein.

Pursuant to said mandate and the opinion of the Court of Appeals in this case, it is hereby ordered that the judgment of this Court of November 13, 1951 set out in Judgment Book No. 121, pages 505-506 be set aside, and the general demurrer of the defendants is hereby sustained.

It appearing that the plaintiffs decline to plead further, [fol. 32] and the Court being sufficiently advised on the said mandate and the said opinion of the Court of Appeals in this action, it is now considered, ordered and adjudged that the rights of the parties be and they are hereby declared as follows:

1. An actual controversy has arisen and exists between the plaintiffs and the defendants.

2. The matters in controversy herein involve a common and general interest to plaintiffs and all other employees of the United States Naval Ordnance Plant who receive their pay for work done or services performed within the limits

of the area on which is located the United States Naval Ordnance Plant, and the defendants.

3. The area comprising the United States Naval Ordnance Plant, having been acquired by condemnation of the United States by and with the consent of the Legislature of the State of Kentucky, and over which area the United States had, on May 23, 1941, accepted exclusive jurisdiction, which acceptance was acknowledged by the Governor of Kentucky on May 26, 1941, was subject to annexation by the City of Louisville thereafter.

4. The plaintiffs and all other employees of the United States Naval Ordnance Plant who receive wages from work done and performed within the area on which the United States Naval Ordnance Plant is located, and to which the United States holds title and has exclusive jurisdiction, perform work within the jurisdiction of the City of Louisville.

5. Plaintiffs and all other employees of the United States Naval Ordnance Plant are, as a consequence, subject to the payment of an occupational tax or license fee imposed by Ordinance No. 83, Series 1950, of the City of Louisville.

[fol. 33] 6. The assessment and collection of the occupational tax or license fee from these plaintiffs and all other employees of the United States Naval Ordnance Plant is not in violation of their constitutional rights, nor does it deprive them of their property without due process of law under the Fourteenth Amendment to the Constitution of the United States.

7. It is further ordered and adjudged that the petition of plaintiffs be dismissed, and that defendants recover their costs in this action for which they may have execution.

8. To all of which plaintiff, by counsel, object and except and pray an appeal to the Court of Appeals of Kentucky, which is hereby granted.

June 4, 1952.

(S.) Macauley L. Smith, Judge.

Tendered by:

(S.) Alex P. Humphrey, Attorney for Defendants.

A copy of this order and judgment has been mailed to attorney for plaintiffs.

(S.) Alex P. Humphrey.

IN THE COURT OF APPEALS OF KENTUCKY

COMMISSIONERS OF THE SINKING FUND OF CITY OF LOUISVILLE, et al., Appellant

vs.

ARNETT M. HOWARD, et al., Appellee

MANDATE—May 16, 1952

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

[fol. 34] It is therefore considered that said judgment be *reversed* and cause remanded with directions to enter a judgment sustaining the general demurrer of the defendants and upholding the right of the city to collect the occupational license tax from persons employed at the Naval Ordnance Plant; which is ordered to be certified to said Court.

A copy—Attest:

Acree Austin, C.C.A. By (S.) Irene C. Austin, D.C.

Issued 5-16-52.

[fol. 35] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

SCHEDULE

The Clerk of the Court is hereby directed to prepare a transcript of the record filed in the Court of Appeals of Kentucky pursuant to the appeal allowed in the above styled action, and to include in such transcript of record the following:

(1) Petition in Equity
(2) Summons and Sheriff's return thereon
(3) Defendants' Special Demurrer
(4) Defendants' General Demurrer
(5) Motion
(6) Order dated July 11, 1951
(7) Second Order dated July 11, 1951

(8) Opinion of Judge Speckman
(9) Judgment dated November 13, 1951
(10) Order and Judgment dated June 4, 1952
Mandate of Court of Appeals
(11) This schedule.

Said transcript to be prepared as required by law and the rules of the Court of Appeals of Kentucky for filing with the Clerk of the Court of Appeals.

(S.) W. A. Armstrong, D. E. Armstrong, Attorneys for Plaintiff.
Gilbert Burnett (h), Alex P. Humphrey, Attorneys for Defendants.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] IN THE COURT OF APPEALS OF KENTUCKY

ARNETT M. HOWARD, et al., Appellants,

vs.

COMMISSIONERS OF SINKING FUND OF CITY OF LOUISVILLE, et al., Appellees.

Appeal from Jefferson Circuit Court Chancery Branch, First Division Macauley L. Smith, Judge.

PER CURIAM

This case was before this Court on a demurrer to the petition. Commissioners of the Sinking Fund of Louisville v. Howard, Ky., 248 S. W. 2d. 340. The judgment of the Circuit Court overruling defendants' demurrer was reversed for reasons set out in that opinion. Upon return of the case to the Circuit Court, judgment was entered in conformity with our opinion. This is an appeal from that judgment. No new issue or additional question is presented, and the Court has not changed its view on any of the questions formerly presented.

Judgment affirmed.

[fol. 38] IN THE KENTUCKY COURT OF APPEALS

ORDER OF SUBMISSION—June 13, 1952

Came parties by counsel, and filed joint motion to docket, advance and submit; which motion is sustained and case ordered docketed for the present term, advanced for hearing and submitted.

Came appellants, by counsel, and filed memorandum.

[fol. 39] IN THE KENTUCKY COURT OF APPEALS

ARNETT M. HOWARD, et al., Appellants,

vs.

COMMISSIONERS OF SINKING FUND OF CITY OF LOUISVILLE, et al., Appellees

Appeal from a judgment of the Jefferson Circuit Court Chancery Branch—First Division.

JUDGMENT—June 20, 1952

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants, their costs herein expended.

[fol. 40] IN THE COURT OF APPEALS OF KENTUCKY

COMMISSIONERS OF THE SINKING FUND OF CITY OF LOUISVILLE, et al., Appellants,

v.

ARNETT M. HOWARD, et al., Appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division

Judge Lawrence F. Speckman

OPINION OF THE COURT BY COMMISSIONER CULLEN

REVERSING

In a declaratory judgment action, the Jefferson Circuit Court held that the City of Louisville was not entitled to collect the city's occupational license tax from persons employed at the Naval Ordnance Plant, located upon property owned by the United States Government. The city appeals.

The controlling question is whether the city had power to annex the Federal area and make it a part of the city, so that persons working in the area would come within the terms of the license tax ordinance, providing that the [fol. 41] tax shall be computed on the gross receipts from work done, business conducted or services performed "in the city."

The area embracing the Naval Ordnance Plant was acquired by the Federal Government, by condemnation, in 1940. Thereafter, in 1941, the Secretary of the Navy accepted "exclusive jurisdiction" over the land, and the acceptance was acknowledged by the Governor of Kentucky. In 1947, the City of Louisville enacted an ordinance proposing the annexation of certain territory adjoining the city, including the Federal area, and in 1950 a final annexation ordinance was enacted, declaring the territory to be annexed to the city. The occupational license tax ordinance was orginally enacted in 1948, and was reenacted in 1950.

By an act of 1940, Title 4, Section 106, U.S.C.A., Congress provided that any state or "any duly constituted taxing

authority therein, having jurisdiction to levy such a tax," may levy and collect income taxes in any Federal area within the state "to the same extent and with the same effect as though such area was not a Federal area." By Title 4, section 110 (c), U.S.C.A., "income tax" is defined [fol. 42] as "any tax levied on, with respect to, or measured by, net income, gross income or gross receipts."

It is agreed by all parties that the area embracing the Naval Ordnance Plant came under the "exclusive jurisdiction" of Congress by virtue of Art. I. Section 8, Clause 17 of the Federal Constitution, KRS 3.010, the acceptance of jurisdiction by the Secretary of the Navy, and the recognition of that acceptance by the Governor of Kentucky. The difference of opinion is as to the effect of such exclusive jurisdiction.

It is the position of the appellees that, with respect to areas under the exclusive jurisdiction of Congress, the jurisdiction of the state and its political subdivisions is completely ousted, and to all intents and purposes the land ceases to be a part of the state within whose borders it lies; that such areas occupy the same status as if they were separate provinces or countries. In support of this position, appellees cite such cases as Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 S. Ct 995; Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227; United States v. Unzeuta, 281 U.S. 138, 50 S. Ct. 284; Surplus Trading Com- [fol. 43] pany v. Cook, 281 U.S. 647, 50 S. Ct. 455; Standard Oil Co. v. California, 291 U.S. 242, 54 S. Ct. 381; Silas Mason Co. vs. Tax Commission, 302 U.S. 186, 58 S. Ct. 233; and Pacific Coast Dairy v. Dept. of Agriculture of California, 318 U.S. 285, 63 S. Ct. 628. We do not question the soundness of those cases, but we think they are not controlling of the issue before us.

The cited cases are authority for the proposition that the state is ousted of any jurisdiction to exercise sovereignty *within* an area under the exclusive jurisdiction of Congress. But in the case before us, the act of annexation by the city did not, of itself, represent any effort or attempt by the city to exercise jurisdiction within the area of the ordnance plant. The city merely elected that the area be included within its geographic boundaries as a political subdivision of the state.

We are impressed with the argument on behalf of the city that the annexation involved only a question of political geography, and not a clash of political sovereignties. Certainly, it could be of no concern to Congress, in which of its political subdivisions a state chose to consider a Federal area to be physically situated. Whether the ordnance plant is considered to be in Louisville or outside of [fol. 44] Louisville could in no way affect the exclusive jurisdiction of Congress to govern the area embracing the plant.

In Davis v. Howard, 306 Ky. 149, 206 S. W. 2d 467, we had under consideration another section of the Congressional Act of 1940, authorizing states to collect sales or use taxes in Federal areas. We held that the Act constituted a recession by the Federal Government, to the state, of a portion of the exclusive jurisdiction theretofore possessed by Congress, and that acceptance of such recession on the part of the state would be presumed in the absence of the showing of a contrary intent.

Under the Davis case, and those from other jurisdictions therein cited, it would appear that a Federal area within the geographic boundaries of a state lies dormant, so far as concerns the authority of the state to exercise jurisdiction within the area, as long as Congress retains exclusive jurisdiction, but when Congress recedes part of its jurisdiction the area comes back to life as a part of the state to the extent of the recession. It seems to us that, even before a recession of jurisdiction by Congress, the State should have the right to determine in which of its political subdivisions a Federal area shall be deemed [fol. 45] to be located, anticipating a recession of jurisdiction, such as the one in this case, that will extend to the political subdivisions as well as the state.

Actually, in the case before us, Congress had receded part of its jurisdiction to Kentucky, and to the political subdivisions of Kentucky, *prior to* the annexation by Louisville. The recession recognized that the land was located in Kentucky, not only with reference to the jurisdiction of the state, but also with reference to the jurisdiction of political subdivisions of the state.

We are advised that the specific question of the power

of a city to annex a Federal area has been passed on only in Wichita Falls v. Bowen, 143 Texas 45, 182 S. W. 2d 695, and in Norfolk County v. City of Portsmouth, 186 Va. 1032, 45 S. E. 2d 136. In both those cases the power to annex was upheld.

It is our opinion that the annexation of the ordnance plant by the City of Louisville was valid.

The appellees point out that the Congressional Act of 1940 authorizes only the levy of an "income tax," and that in City of Louisville v. Sebree, 308 Ky. 420, 214 S.W. 2d 248, this Court specifically held the Louisville occupa- [fol. 46] tional tax was not an income tax. It is true we held in the Sebree case that the tax was not an income tax within the meaning of the Kentucky Constitution, but the question here is whether it is an income tax as that term is defined in the Act of Congress. As previously pointed out in this opinion, the Act of Congress defines "income tax" to include any tax "measured by" net income, gross income or gross receipts. We said in the Sebree case that the Louisville tax is a license tax which "measures the value of the privilege by the amount of earnings or net profits." The tax clearly falls within the definition made by the Act of Congress.

The judgment is reversed, with directions to enter a judgment sustaining the general demurrer of the defendants, and upholding the right of the city to collect the occupational license tax from persons employed at the Naval Ordnance Plant.

[fol. 47] IN THE KENTUCKY COURT OF APPEALS

COMMISSIONERS OF SINKING FUND OF CITY OF LOUISVILLE, et al., Appellants,

vs.

ARNETT M. HOWARD, et al., Appellees.

Appeal from a judgment of the Jefferson Circuit Court Chancery Branch—First Division.

JUDGMENT—March 28, 1952

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded with directions to enter a judgment sustaining the general demurrer of the defendants and upholding the right of the city to collect the occupational license tax from persons employed at the Naval Ordnance Plant; which is ordered to be certified to said Court.

It is further considered that the appellants recover of the appellees, their costs herein expended.

[fol. 48] IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed August 4, 1952

To the Honorable Chief Justice of the Court of Appeals of Kentucky:

Come now the appellants in the above entitled cause, and respectfully show:

On June 20, 1952, the Court of Appeals of Kentucky rendered its final decision and judgment in the above entitled cause affirming the judgment entered in the Jefferson Circuit Court on June 4th, 1952. The Court of Appeals of Kentucky had theretofore reversed the judgment of

the Jefferson Circuit Court on November 13, 1951. See Commissioners of the Sinking Fund, et al. v. Howard, 248 SW 2d 340. In that case there was drawn in question the validity of an ordinance of the City of Louisville levying an occupational or license fee in so far as it affected employees of such Federal area, on the ground that the annexation ordinance was repugnant to Article 1, Section 8, Clause 17 of the United States Constitution, and as being repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the judgment was in favor of the said ordinances' validity.

Considering themselves aggrieved by the final decision of the Court of Appeals of Kentucky in the case, appellants pray that an appeal be allowed to the Supreme Court of the United States, and for an order fixing the amount of bond for costs thereon.

[fols. 49-64] ASSIGNMENT OF ERRORS

The appellants assign the following errors in the record and proceedings in this cause:

1. The Court of Appeals of Kentucky erred in upholding the validity of the annexation ordinance, in so far as the Federal area is concerned, and in holding and deciding that the said ordinance did not violate Clause 17, Section 8, Article 1 of the United States Constitution.

2. The Court of Appeals of Kentucky erred in holding that after the United States had acquired title to the Federal area in question, and had, by reason of its use, exclusive jurisdiction under Article 1, Section 8, Clause 17 of the United States Constitution, and also by affirmative action of the Acting Secretary of the Navy, acting under authority conferred by Title 40, Section 255, U.S.C.A., the City of Louisville could, by ordinance enacted under Section 81,100 et seq K.R.S., annex such Federal area so as to make it a part of the City of Louisville and subject to its ordinances.

3. The Court of Appeals of Kentucky erred in holding that the City of Louisville's Occupational tax or license fee was an income tax within the meaning of the Congressional Act of 1940, shown as Title 4, Section 106, U.S.C.A., and

in holding that said occupational tax or license fee was not an income tax under the Constitution of Kentucky.

4. The Court of Appeals of Kentucky erred in holding that these appellants were not deprived of their property without due process of law under the Fourteenth Amendment of the Constitution of the United States.

PRAYER FOR REVERSAL

For which errors the appellants pray that the judgment of the Court of Appeals of Kentucky, rendered June 20, 1952 in the above entitled cause, be reversed and judgment rendered in favor of appellants and for costs.

W. A. Armstrong, Donald E. Armstrong, Counsel for Appellants.

FILED: August 4, 1952

[fol. 65] IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER ALLOWING APPEAL—August 4, 1952

The appellants in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the judgment rendered in said cause by the Court of Appeals of Kentucky, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

It is Ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Court of Appeals of Kentucky in the above entitled cause as provided by law, and it is further Ordered that the Clerk of the Court of Appeals of Kentucky shall prepare and certify a transcript of the record, proceedings and judgments in said cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 40 days of this date.

And it is further Ordered that security for costs on appeal be fixed in the sum of $500.00.

Dated: 8/4/52.

James W. Cammack, Chief Justice of the Court of Appeals of Kentucky.

[fols. 66-67] Cost Bond on Appeal approved and filed August 4, 1952 omitted in printing.

[fols. 68-71] Citation in usual form showing service on Gilbert Burnett and Alex Humphrey omitted in printing.

[fol. 72] IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRAECIPE FOR RECORD—August 6, 1952

To the Clerk of the Court of Appeals of Kentucky:

You are hereby requested to prepare a transcript of the entire record in this cause and to transmit it to the Clerk of the Supreme Court of the United States, at Washington, D. C., duly certified and authenticated, and within the time prescribed by the Rules of the Supreme Court of the United States, including in said transcript:

1. The record of appeal in said cause;
2. The opinion of the Court of Appeals of Kentucky;
3. All journal entries contained in the record and proceedings of the Court of Appeals of Kentucky relating to said cause;
4. The final judgment and decision of the Court of Appeals of Kentucky in said cause;
5. The judgment and decision of the Court of Appeals of Kentucky in the cause styled Commissioners of the Sinking Fund of the City of Louisville, et al v. Howard, et al, decided March 28, 1952, rehearing denied May 16th, 1952, which shall be attached as an appendix to your record;

6. The petition for appeal, assignment of errors and prayer for reversal;

7. Statement as to jurisdiction, including all appendices;

8. Order allowing appeal;

9. Bond;

[fol. 73] 10. The Original citation.

11. Acknowledgment of receipt of copy of petition for appeal, assignment of errors and prayer for reversal; Statement as to jurisdiction; Statement calling attention to Rule 12, Paragraph 3, United States Supreme Court rules; order allowing appeal.

12. This praecipe, including acceptance of service.

W. A. Armstrong, D. E. Armstrong, Attorneys for Appellants.

Dated: August 6th, 1952.

Copy of the praecipe received this 6 day of August, 1952.
Gilbert Burnett, Alex P. Humphrey, Attorneys for Appellees.

[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 75] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, ——

No. —

STATEMENT OF POINTS RELIED UPON AND STIPULATION COVERING PRINTING OF RECORD

Appellants adopt their assignments of errors as their statement of the points to be relied upon in this Court.

It is stipulated that the whole of the record on appeal shall be printed.

W. A. Armstrong, D. E. Armstrong, Attorneys for Appellants; Gilbert V. Burnett, Alex P. Humphrey, Attorneys for Appellees.

Dated: August 6, 1952

[fol. 76] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 27, 1952.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

October 27, 1952.

(5030)